

**JOHN H. DELGADO**  
Claimant

**PAWNEE COUNTY COOP**  
Respondent

**COOPERATIVE MUTUAL INSURANCE**  
Insurance Carrier

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## ORDER

## ISSUES

- "(1) Whether claimant suffered an accidental injury to the lumbar spine arising out of and in the course of employment with respondent on June 16, 2000.
- "(2) Whether actual knowledge by the claimant's immediate supervisor who thought the claimant had hurt his knee rendered the giving of notice of accident within 10 days unnecessary, if not,
- "(3) Whether the failure to give notice of accident to the spine within 10 days was for just cause and the certified mail return receipt letter delivered to respondent within 75 days of the date of accident cured any lack of notice of accident, or

- "(4) Whether under the facts of this case, the employee was physically unable to give such notice under K.S.A. 44-520(c) as said employee did not know if the part of the body injured was the knee or the back until more than 10 days after the date accident, and said employee did not know if or how to report aggravation of a preexisting condition, or if the current employer may be responsible to provide medical treatment when an employee aggravates a preexisting condition.
- "(5) Whether the Administrative Law Judge based his decision upon medical records not in evidence at the December 1, 2000, preliminary hearing, and a decision favorable to claimant is mandated by the evidence of record."

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds the Order of the Administrative Law Judge should be affirmed.

Claimant was a manual laborer working for respondent when, on June 16, 2000, he claims to have suffered an injury to his low back. Claimant testified that, while scooping grain, he felt a burning and a pop in his back. Claimant, however, did not tell anyone employed with respondent of his back injury.

Claimant's medical history is significant in that, in 1981, he suffered an injury to his back resulting in surgery and a 20 percent whole person impairment. In 1994, while working construction, claimant suffered an injury to his right knee, which resulted in surgery.

Claimant did discuss on more than one occasion symptoms associated with his right knee. Claimant told both his immediate supervisor, Ivan Roberts, and coworkers of problems associated with his right knee. Claimant even showed Mr. Roberts the swelling in his right knee. Mr. Roberts acknowledged claimant had discussed the knee problems with him and mentioned he needed to go to the pharmacist in order to get an anti-inflammatory medication for the knee. However, claimant never mentioned any problems associated with his back. The Administrative Law Judge found it significant that the symptoms displayed by claimant while working for respondent were to the knee and not the back. Claimant's claim against respondent involves only the back and does not include the knee.

Claimant first sought medical treatment on July 21, 2000, at St. Joseph Family Practice in Larned, Kansas. Tommy C. Norris, D.O., an osteopath, noted claimant was there for chronic back pain. There is no mention in Dr. Norris's or the Central Kansas Medical Center records of any work-related accident. The first mention in any medical record of any connection between claimant's back pain and his employment with respondent is in the medical report of Paul S. Stein, M.D., dated October 12, 2000. That visit occurred approximately two months after claimant first contacted his attorney and initiated the litigation of this claim.

Claimant acknowledges he did not mention the back injury on June 16, 2000, or at any time while employed for respondent. Claimant advised one of his coworkers on June 16, 2000, that he was going on break and simply never returned to work for respondent.

Claimant first sought legal advice in August 2000. His claim letter to respondent is dated August 11, 2000, and was received certified mail by respondent on August 12, 2000. The letter alleges that claimant suffered a back injury on June 16, 2000, associated with his employment. That letter is the first document in the record to indicate a connection between claimant's back complaints and his employment with respondent.

Claimant also contacted his employer at about that time at the request of his attorney. He spoke with Michael David Graham, the respondent's general manager. According to Mr. Graham, claimant called him and advised that he had had a prior back injury with a prior employer but that claimant never mentioned or claimed any type of work-related aggravation during that telephone conversation. It was not until he received the claim letter from the claimant's attorney that Mr. Graham understood that claimant was alleging an injury or aggravation during his employment with respondent.

Mr. Roberts, claimant's immediate supervisor, worked with or near him on a daily basis. At no time did he note claimant acting like he had any type of back pain. The only complaints claimant ever mentioned to Mr. Roberts were associated with the knee pain and swelling. On claimant's E-1 Application for Hearing, filed with the Division of Workers Compensation on September 1, 2000, the only injury alleged is to claimant's "spine and all related systems, aggravation of prior low back condition and additional discomfort disability". The E-1 does not mention claimant's right knee.

In workers' compensation litigation, it is claimant's burden to establish his right to an award of compensation by proving the various conditions upon which that right depends by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). See *also* Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Claimant's testimony is not sufficient to support a finding that he suffered an injury to his low back or even an aggravation of his preexisting back problems. Claimant failed to mention any low back symptoms to any of his employers' representatives or any of his coworkers. Additionally, claimant did not seek medical treatment for this alleged back injury until over a month after leaving his employment with respondent. Finally, claimant failed to discuss any work-related connection to his back problems with his physicians until after conferring with his attorney. The initial medical records associated with the treatment of claimant's back do not mention claimant's employment but merely mention the fact that claimant has had a long history of back problems.

The phrase "out of" employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). The evidence in the record does not satisfy claimant's burden of proving a causal connection between the back complaints and his employment.

K.S.A. 44-520 requires a worker report an accident within 10 days after the date of accident. That notice shall state the time and place and particulars of the accident. The notice provided by claimant of his symptoms to his right knee does not constitute notice of a sudden and traumatic incident involving claimant's low back. The particulars associated with claimant's low back complaints do not surface in the record until, at the very earliest, the August 11, 2000, claim letter from his attorney. Even the medical records associated with the treatment provided to claimant in July 2000 fail to mention any work-related connection.

K.S.A. 44-520 also states that actual knowledge of an accident by the employer or the employer's duly authorized agent renders the giving of notice unnecessary. Again, the knowledge possessed by respondent, which is freely admitted, is associated with the knee only. Claimant acknowledges in his testimony that he failed to mention anything to respondent about the alleged back injury. Respondent's knowledge of claimant's swollen knee does not constitute knowledge of a back injury allegedly suffered while shoveling. The Appeals Board, therefore, finds claimant has failed to satisfy the provisions of K.S.A. 44-520 and timely notice of accident was not provided.

Claimant goes on to argue that he has established just cause for expanding the notice period from 10 days to 75 days under K.S.A. 44-520. The Board has, in the past, discussed factors to be considered in determining whether just cause exists. This list, while not an exhaustive list, does include the following factors:

- (1) The nature of the accident, including whether the accident occurred as a single traumatic event or developed gradually.

- (2) Whether the employee is aware he or she have sustained either an accident or injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether respondent has posted notice as required by K.A.R. 51-12-2.

Here, claimant alleges a sudden and traumatic incident resulting in burning and pain in his low back. Claimant attempts to confuse the issue by arguing that he was not sure whether the pain in his knee was associated with his knee and his back. However, that does not resolve claimant's problem that he testified specifically to a sudden and traumatic onset of pain, including burning and a pop associated with his low back. With claimant's prior history of back problems and surgery, this should have been sufficient to alert claimant to an injury associated with his employment. Additionally, it is uncontradicted that respondent's Form 40 was properly posted. That fact was noted by the Administrative Law Judge during the preliminary hearing.

The Board finds that claimant has not established just cause for extending the notice time from 10 days to 75 days under K.S.A. 44-520 for the alleged back injury.

For the above reasons, the Appeals Board finds that the Order of the Administrative Law Judge denying claimant benefits in this matter should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated December 4, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 2001.

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BOARD MEMBER

c: Kent Roth, Ellinwood, KS  
Thomas J. Berscheidt, Great Bend, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director